86-470

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

SEATTLE TOTEMS HOCKEY CLUB, INC., *et al.*,
Petitioners,

v.

NATIONAL HOCKEY LEAGUE, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1) Whether the National Hockey League's use of the Seattle Totems as an instrumentality to destroy an incipient rival, the World Hockey Association, and in the process causing injury to the business and property of the Seattle Totems, grants standing, pursuant to 15 U.S.C. § 15, to the Seattle Totems, within the holding of *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 73 L.Ed.2d 199, 102 S. Ct. 2540 (1982).

PARTIES

Petitioners—plaintiffs-appellants below—are Seattle Totems Hockey Club, Inc., a Washington corporation, Vincent H.D. Abbey and Eldred W. Barnes.

Respondents—defendants-appellees below—are The National Hockey League, a non-profit unincorporated association with its principal place of business in Montreal, Quebec, Canada; Northwest Sports Enterprises, Ltd., a British Columbia, Canada corporation; Vaucouver Hockey Club, Ltd., a British Columbia corporation; Frank A. Griffiths; William J. Hughes; Boston Professional Hockey Association, Inc., a Massachusetts corporation; Chicago Blackhawks Hockey Team, Inc., an Illinois corporation; Philadelphia Hockey Club, Inc., a Pennsylvania corporation; Maple Leaf Gardens, Ltd., an Ontario, Canada corporation; Members Limited Partners, a California limited partnership; Niagara Frontier Hockey Corporation, a New York corporation; Atlanta Hockey, Inc., a Georgia corporation; and Nassau Sports, Ltd., a New York limited partnership.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners Seattle Totems Hockey Club, Inc., et al., respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of petitioners' complaint for lack of standing is reported at 783 F.2d 1847 (9th Cir. 1986), rehearing denied August 6, 1986, and is set forth as Appendix "A" to this Petition. The district court's unreported order and opinion, entered December 19, 1983, is set forth as Appendix "B" to this Petition and the district courts' unreported opinion dated January 10, 1984, is set forth as Appendix "C" hereto.

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JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the district court as to petitioners' appeal, and reversing and remanding as to a cross-appeal, was entered on February 28, 1986. A timely petition for rehearing before the Court of Appeals was denied on August 6, 1986. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit by Writ of Certiorari pursuant to 28 U.S.C. § 2101(c).

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STATUTES INVOLVED IN THE CASE

15 U.S.C. §§ 1 and 2 (Sherman Act); 15 U.S.C. § 15(a) (Clayton Act). See Appendix "D."

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STATEMENT OF THE CASE

A. Background

This case arises out of the efforts of the National Hockey League ("NHL"), which had acquired and maintained a monopoly over all professional hockey in North America, to destroy an incipient competitor, the World Hockey Association ("WHA"). As an integral part of its war with the WHA, the NHL, using the promise of expansion franchises in its league, enticed the Western Hockey League and its member clubs, including the Seattle Totems Hockey Club, Inc. ("Totems"), to continue operations in major western cities, subsidized in part by the NHL, thus foreclosing those territories to the WHA. Subsequently, when competition with the WHA was effectively eliminated, the NHL withdrew its support of the Western Hockey League, reneged on its promises to grant expansion franchises, and effectively destroyed the Western Hockey League and the Seattle Totems, a result that was clearly foreseeable.

The NHL was organized in 1917. By 1942, the league consisted of six teams located in Detroit, Chicago, New York, Boston, Montreal and Toronto. [Tr. 148.] By the mid-1960's, through a series of agreements and practices, the NHL and its member teams had acquired and maintained a monopoly over all professional hockey in North America. That monopoly was intentionally acquired through the NHL's total control over the supply of all hockey players capable of playing the sport at the professional level. The monopoly so achieved was exercised to exclude competition and to obtain total control over all major league professional hockey franchises.

That series of agreements and practices, and their interrelationship one to the other, are described in detail in the Findings of Fact and Conclusions of Law of Judge Higginbotham in *Philadelphia World Hockey Club v. Philadelphia Hockey Club,* 351 F. Supp. 462 (E.D. Pa. 1972) (professional hockey antitrust litigation, MDL 119, E. Dist. Pa.). As proved in this litigation, they include the following:

1. An agreement with the governing bodies of amateur hockey in the United States and Canada (the "Pro-Am Agreement"), wherein the parties recognized each other as the exclusive governing bodies of amateur and professional hockey, and agreed to deal only with each other in all matters pertaining thereto (PX 207, 315, 389);

2. The Universal Amateur Draft, which permitted the NHL to draft every amateur who had the ability to play professionally at any level, and to retain title to those players, directly or indirectly, even though the player might be assigned to play somewhere other than in the NHL (PX 207, 315, 389, 925, 927, Tr. 344);

3. The Standard Players Contract, containing a reserve clause which was, in fact, a perpetual option in favor of the NHL team, permitting it to renew the player's contract for each successive year (PX 950-964, Tr. 235, Tr. 304);

4. The NHL Bylaws, and most importantly, Section 9.8(a) thereof, which provide that every transfer of a player from an NHL club to any other affiliated or associated club in another league shall contain a provision for the right of repurchase by the NHL member club (PX 925, Tr. 182, 522, 523, 993, 994, 1778-1781, 3962-3979, 3987);

5. Each NHL team was required to operate at least one Player Development Club, which allowed the NHL teams to "warehouse" all of the players taken each year in the Universal Amateur Draft who did not actually play for NHL teams (PX 925, § 13; Tr. 186);

6. A Joint Affiliation Agreement (the "JAA"), wherein the subservient minor leagues, such as the Western Hockey League and its counterpart, the American Hockey League, recognized the reserve lists of the NHL, and thus, the NHL's monopoly over all players capable of playing the game at the professional level. Each NHL team was allowed to protect 37 players, although only 17 were skating with each NHL club (PX 336; Tr. 248). Thus, in 1972, the NHL was able to protect 518 players, while skating only 280 in NHL play. Each time the Western Hockey League, or its member clubs, indicated a reluctance to be bound by the provisions of the JAA, they were threatened by the NHL, generally through its president, to the effect that they would find themselves unable to obtain players if they did not abide by the agreements (PX 216, 217, 221; Tr. 333-336, 450, 451, 1035); and

7. An Interleague Draft, recognized by the JAA and the Pro-Am Agreement, which permitted the NHL to annually draft one player (i.e., the best player) from each Western Hockey League or American Hockey League Team, thus preventing the teams in those leagues from owning any player of ability.

In the mid-1960's, the NHL remained regional in scope, consisting of six teams located in the Northeastern United States and nearby Canadian cities. In 1964, the Western Hockey League consisted of six teams located in

Seattle, Portland, Denver, San Francisco, Los Angeles, and Vancouver, B.C. San Diego was scheduled to become a member of the Western Hockey League in 1965 (PX 237). Each of the Western Hockey League cities either had, or were then constructing, buildings with sufficient seating capacity to exhibit major league hockey (Tr. 555, 1768, 1769).

In January, 1965, the Western Hockey League informed the NHL, in writing, that the time for major league expansion to the West Coast had arrived, stating that the cities of Los Angeles, San Francisco, Portland and Seattle wished to make formal application to become members of the NHL. The NHL responded by announcing its own plan of expansion, through the formation of a second six-team division, the effect of which was to thwart the attempt of the Western Hockey League to either join the NHL or to form its own major league. NHL franchises were granted to six United States cities, including Los Angeles and San Francisco-Oakland, to commence play in the 1967-68 season. The franchises established in Los Angeles and San Francisco-Oakland were not awarded to the owners of the Western Hockey League teams situated in those cities (PX 266-267). As a consequence of that and subsequent expansions, most of the players in the Western Hockey League who were on loan from NHL teams, and who were subject to recall because of Section 9.8(a) of the NHL Bylaws, were recalled from Western Hockey League teams.

By 1970, the NHL had expanded from 6 to 14 teams. As a consequence thereof, the Western Hockey League found itself in dire straits, with each of its teams losing substantial sums because of the dramatic increase of sal-

aries brought about by NHL expansion, and the consequent dilution of talent to play the game at the minor league level.

In the summer of 1971, the World Hockey Association ("WHA") was formed, declared itself to be a major league and announced that it would commence play in 1972 (Tr. 1291, 1292). In October 1971, at a meeting of its Board of Governors held at Homosassa, Florida, the NHL formulated a battle plan to combat the rival WHA. That plan contemplated, *inter alia*, immediate expansion into certain cities known to be coveted by the WHA, the signing of all amateurs to standard player contracts, threats to players already under contract that the reserve clause would be enforced in court, and a strategy to prevent the WHA from establishing itself in other cities which could support major league hockey, including, foremost, the then-existing cities of the Western Hockey League. (PX 445; Tr. 2820-2831, 2867-2871). Immediately thereafter, the NHL announced expansion into Long Island, New York and Atlanta, Georgia, to commence play for the 1972 season. (PX 448, 449). Subsequently, in 1972, the NHL announced that it would expand into Kansas City and Washington, D. C., for play commencing in the 1974 season. (PX 567).

In December, 1971, the member teams of the Western Hockey League, by this time in desperate financial straits as a direct result of NHL expansion, presented the NHL with a "position paper" which set forth the options facing the western cities as they saw them (PX 455):

> 1. Attempt to stay alive and compete with the NHL and the WHA as a minor league;

2. Form its own major league;
3. Go out of business; or
4. Join the WHA.

Realizing that the WHA would be greatly strengthened if it were able to place teams in the cities where the Western Hockey League operated, and in order to keep the WHA out of those territories, the NHL proposed an agreement to the member clubs of the Western Hockey League, which agreement has come to be known as the "White Paper." Although prior to the emergence of the WHA, the NHL had shown little interest in the survival of the Western Hockey League, the White Paper provided, *inter alia*, that the then cities of the Western Hockey League would receive half of all expansion franchises to be awarded by the NHL, until four such franchises had been awarded to member clubs of the Western League. It further provided that the NHL would guarantee the continual operation of the Western Hockey League, as a six-team league, until such time as at least three western teams had become members of the NHL. (PX 529). The NHL's purpose and intent in entering into this agreement was to keep the WHA from establishing teams in Seattle, Portland, San Diego, Phoenix, Salt Lake and Denver—cities which the NHL recognized as "major league." (Tr. 2835, 2836, 2873).

That the White Paper was conceived as a method by which to ward off competition from the WHA, and that the member teams of the NHL were engaged in a conspiracy to exclude the WHA from cities which were suitable for major league hockey, is supported by substantial direct evidence. Thomas Scallen, a then member of the

Board of Governors of the NHL, testified that, at the October 1971 meeting of the NHL Governors at Homasassa, Florida, the defendants formed a battle plan to combat the rival WHA. This battle plan took two forms: (1) expand quickly into cities which were potential locations for WHA teams; and (2) sign as many players as possible. Scallen further testified that the purpose of the White Paper was to keep the WHA out of the cities of the Western Hockey League, and to freeze those cities for the NHL. Specifically, Scallen testified that, by granting to the member clubs of the Western Hockey League the right to join the NHL on attractive and favorable terms, the NHL enticed the Western Hockey League into foregoing membership in the WHA (Tr. 2820-2836, 2846).

The testimony of Mr. Scallen was corroborated by that of another then NHL governor, Mr. Thayer Potter. Mr. Potter described the White Paper as the means by which the WHA would be destroyed. He testified that, once promised franchises in the NHL, the cities of the Western League would forego any chance to join the WHA and would opt instead for the NHL. (Tr. 2873).

Because of its concern that the Western Hockey League would join its new competitor, the WHA, or, as problematically, go out of business and leave those locations available to the WHA, the NHL encouraged each of its member clubs to strengthen its ties with the teams of the Western Hockey League to prevent the WHA from establishing teams in desirable western cities. As stated, the Totems had experienced severe financial difficulties because of the NHL monopoly, the spiraling salaries and other operational costs brought about by the NHL-WHA war.

Prior to joining the NHL, the Vancouver Canucks operated in the Western Hockey League. Its move to the NHL required Vancouver to find a suitable location for its Western Hockey League franchise. Since it was mandatory that each NHL team have a player development club, Vancouver entered into an agreement with the Seattle Totems, whereby the former took control of the Seattle franchise and agreed to operate and manage the Totems in the Western Hockey League until such time as Seattle became an active playing member of the NHL. Vancouver assumed operational control of the Totems on April 7, 1972 (APX 2).

In August 1972, the WHA sued the NHL and its member clubs in Philadelphia, charging the NHL with violations of the federal antitrust laws. The NHL counterclaimed, requesting the court to enjoin certain NHL players from signing contracts with the WHA. Following extensive hearings, the trial court found, *inter alia*, that the NHL was a monopoly. (*Philadelphia World Hockey Club v. Philadelphia Hockey Club,* 351 F. Supp. 462 (E.D. Pa., 1962)). Thereafter, by February, 1974, the NHL and the WHA had entered into a consent decree terminating the litigation (PX 630). Although the war between the NHL and WHA was not over, both sides had secretly agreed not to price themselves out of existence and to discuss merger. (PX 575; Tr. 672-674, 1145, 1146, 4429-4435). The two leagues met constantly to discuss merger from 1972 until a merger was accomplished in 1978. (Tr. 1145, 1146). By then, only four of the original fourteen WHA teams had survived the NHL's battle plan, which included expansion, over-signing and over-paying players, and the White Paper.

In June of 1974, after the entry of the consent decree in the WHA litigation, the NHL announced the award of a "conditional" expansion franchise to Seattle and to Denver, with both teams not to commence play in the NHL until October, 1976, some 28 months after the announcement (Tr. 1397, 1398). As a precondition of the announcement of the "conditional" franchises, the NHL required that the White Paper agreement be abrogated and that the Western Hockey League be dissolved. As a further precondition, Seattle and Denver were to pay indemnities to San Diego and Salt Lake for the NHL's further invasion of Western League territories. The NHL also required Seattle to satisfy Vancouver's financial demands. With the abrogation of the White Paper, the NHL escaped from all of the contractual obligations and guarantees which had been made to the Western Hockey League clubs, including Seattle (Tr. 703-705). It was clearly foreseeable that, if a franchise was not awarded to Seattle, plaintiffs' business and property would be utterly destroyed, since they would be left without a league in which to compete.

Other than the announcement of a "conditional" franchise, the Totems received no documentation from the NHL concerning rights to an expansion franchise. Plaintiff Abbey, the Totems' Chief Executive, was advised by his attorneys that, without appropriate documentation from the NHL, the Totems would be in violation of United States, Canadian and various state securities laws and regulations if it made any offering of Seattle Totems securities. (Atr. 553-556; Tr. 1458-1462). Although Abbey made repeated requests of the NHL for such documentation, none was

forthcoming until mid-April of 1975 (PX 730-732; Tr. 1463), by which time Vancouver had informed the Totems that it would not operate its development club in Seattle during the next season, opting instead for a joint operation of a development club in Tulsa in cooperation with a WHA team.

The NHL informed Abbey that it was necessary for him to repurchase Seattle Totems stock held by Vancouver and to pledge the same to the NHL. Vancouver insisted that the amount owed it as a result of its operation of the Totems in the Western Hockey League was between $1.8 and $2 million, an amount greatly in excess of Abbey's estimates, but steadfastly refused to provide an accounting to support such a demand. Abbey's requests for an accounting were simply disregarded. He never received a breakdown of what was included in the amounts which Vancouver claimed. (APX 195; Atr. 544-546, 549, 558, 559). Although Vancouver had a contractual duty to retransfer the Totems stock to Abbey and his associate, it refused to provide the originals of the stock certificates, even after receiving payment of $146,429 therefor. Without an accounting of the exact amount claimed to be owed by Vancouver, and without the originals of the stock certificates, Abbey was advised by his attorneys that he could not attempt to raise money for an NHL franchise. (Atr. 556).

No NHL franchise was ever awarded to a Western Hockey League city pursuant to the White Paper. Very substantial direct evidence demonstrates that the defendants conspired to destroy a rival competitive league (the WHA), and did so, in part, by means of the enticements contained in the White Paper agreement promulgated by

it to the Western Hockey League teams. Defendants destroyed the WHA as a competitive force, and in the process combined, conspired and used their monopoly power to prevent the plaintiffs from obtaining a promised franchise in the NHL. It was clearly foreseeable that the failure to grant the promised NHL franchise, after the Western Hockey League had been dismembered following the announcement of the award of "conditional" franchises, and after the entry of the consent decree which ended the WHA litigation, would severely damage the plaintiffs. Indeed, as a direct result, the plaintiffs have suffered the complete destruction of their business and property within the contemplation of Section 4 of the Clayton Act, 15 U.S.C. § 15.

B. Proceedings Below.

On November 17, 1975, the Seattle Totems and plaintiffs Barnes and Abbey filed a complaint in the United States District Court for the Western District of Washington at Seattle against the NHL and certain NHL member clubs and individuals associated therewith. The complaint alleged that the defendants violated the Sherman Act (15 U.S.C. §§ 1, 2 and 3) by engaging in a conspiracy in restraint of trade and by monopolizing professional ice hockey. The District Court had subject matter jurisdiction of those claims pursuant to 15 U.S.C. §§ 4 and 15, and 28 U.S.C. § 1337.

Two and a half years later, on May 25, 1978, defendant Northwest Sports Enterprises, Ltd., parent of the NHL member club Vancouver Canucks, filed an action against Abbey and Barnes in the Supreme Court of British Columbia, Canada. By order of the United States

District Court dated February 9, 1979, Northwest Sports was enjoined from the further prosecution of that lawsuit in the Canadian court. That decision was appealed and was subsequently affirmed by the Ninth Circuit Court of Appeals, *Northwest Sports Enterprises, Ltd. v. Seattle Totems Hockey Club, Inc., et al.*, 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105, 102 S.Ct. 2902, 73 L.Ed. 2d 1313 (1982).

Northwest Sports filed its counterclaim against Abbey and Barnes in this proceeding on June 13, 1979.

On July 1, 1983, the Honorable Donald S. Voorhees, United States District Judge, ordered bifurcated trials of the antitrust action and the counterclaim. On October 19, 1983, after the conclusion of testimony in the counterclaim trial, the court granted cross-motions for directed verdicts. The trial court held that a 1974 agreement between Abbey and Barnes and Vancouver never took effect because a precondition thereto, the announcement of the grant of an NHL franchise, never occurred. With regard to an earlier (1972) agreement, the trial court held as a matter of fact upon which reasonable minds could not differ that Abbey and Barnes were not responsible for Vancouver's player development costs, and entered judgment against them, pursuant to that agreement, for a percentage of other costs incurred by Vancouver. No jury determination was made of any issue, including the plaintiffs' counterclaim defenses of contractual interference and bad faith. That decision resulted in cross-appeals by Northwest Sports and Abbey and Barnes to the United States Court of Appeals for the Ninth Circuit.

In the bifurcated antitrust action, after 23 days of trial, and just prior to completion of the presentation of defendants' case, the trial court granted defendants' mo-

tion for a directed verdict. Plaintiffs appealed from that decision.

On February 28, 1986, the United States Court of Appeals for the Ninth Circuit entered its opinion, affirming as to the plaintiffs' appeal, and reversing and remanding as to the cross-appeal of defendant Northwest Sports. The Circuit Court held that the Totems were not competitors of the NHL and that the denial of an NHL franchase, under the circumstances, did not injure competition. The Circuit Court also ruled that the parties intended that the announcement, rather than the award, of an NHL franchise fulfilled the condition precedent to the 1974 agreement, reversed the decision of the trial court and remanded for further proceedings. The Circuit Court also reversed the trial court's finding that the parties had not intended player development costs to be included in the 1972 or 1974 agreements, let stand the judgment under the 1972 agreement, and ordered an additur thereto, although the 1974 agreement, by its terms, supersedes the 1972 agreement. No trier of fact has, to date, made any determination as to any of the proceedings below.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Court of Appeals has decided an important federal question in a way which is in direct conflict with this Court's recent decisions in *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 73 L.Ed.2d 149, 102 S.Ct. 2540 (1982) and *Associated General Contractors of California, Inc. v. California State*

Council of Carpenters, 459 U.S. 519, 74 L.Ed.2d 723, 103 S.Ct. 897 (1983).

The Court of Appeals disposed of the plaintiffs' antitrust allegations in the following manner:

> The Totems argue that there is more here than the mere denial of a sports franchise. They argue that there was a grand scheme on the part of the NHL to destroy the WHA by promising franchises to WHL teams so that those teams would not join the WHA. Once peace had been made between the NHL and WHA, however, the NHL moved to avoid its "responsibilities" under its White Paper agreement with the WHL. One of those alleged "moves" was apparently to deny Seattle a franchise. This argument misses the point. The Totems' allegations of wrongful conduct by the NHL do not establish that competition in the relevant market was injured by those acts. Consequently, the Totems have failed to meet their burden of proof on this issue.

783 F.2d 1347 at 1350.

In so holding, the Court of Appeals erred in precisely the same manner as did the trial court in *Blue Shield of Virginia v. McCready, supra.* In *McCready,* the respondent, as part of her employment compensation, was provided coverage under a prepaid health plan purchased by her employer from the petitioner, Blue Shield of Virginia. The plan provided reimbursement for part of the cost incurred by subscribers for out-patient treatment for mental and nervous disorders, including psychotherapy. Blue Shield's practice was to reimburse subscribers for services provided by psychiatrists, but not psychologists, unless the latter's treatment was supervised by, and billed through, a physician. While a subscriber to the plan, McCready was treated by a clinical psychologist. She submitted claims

to Blue Shield for the cost of treatment, but those claims were routinely denied because they had not been billed through a physician. McCready brought a class action charging an unlawful conspiracy to exclude psychologists from receiving compensation, alleging that Blue Shield's failure to reimburse her was in furtherance of that conspiracy, and that such conduct had caused injury to her business or property for which she was entitled to recover under § 4 of the Clayton Act, 15 U.S.C. § 15.

The trial court dismissed, holding that McCready had no standing under § 4 to maintain her suit. In that court's view, although McCready had clearly suffered injury by being denied reimbursement, she was not "within the sector of the economy competitively endangered by the defendant's alleged violations of the antitrust laws." The trial court noted that the goal of the alleged boycott was to exclude clinical psychologists from a segment of the psychotherapy market, and concluded that the sector of the economy competitively endangered by the charged violation extended no further than the area occupied by the psychologists. Thus, although injured by being denied reimbursement, the trial court held that McCready's injury was too indirect and remote to be considered an antitrust injury. This Court disagreed, analyzing the remedial provisions of the Clayton Act as follows:

> *The statute (Section 4 of the Clayton Act) does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . .* The Act is comprehensive in its terms and coverage, protecting all who were made victims of the forbidden practices by whomever they may be perpetrated. *Mandeville Farms v. Sugar Company,* 334 U.S. 210, 236, 92 L.Ed. 1328, 68 S.Ct. 996 (1948) (emphasis added).

457 U.S. at 472.

This Court, drawing on statutory policy, then pointed out that there are two types of limitations on the availability of a Section 4 remedy to particular classes of persons for redress of particular forms of injury. Specifically, the Court referred to the concern about overlapping or conflicting damage claims and complex problems of apportionment of damages, as reflected in its decisions in *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 31 L.Ed.2d 184, 92 S.Ct. 885 (1972), and *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 520 L.Ed.2d 707, 97 S.Ct. 2061 (1977). This Court stated that the policies identified in *Hawaii* and *Illinois Brick* offered no support for the petitioners in the *McCready* case, since those cases focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws. McCready's alleged damages were not duplicative of those which might have been suffered by any other potential claimant.

This Court then discussed the analytically distinct, and conceptually more difficult, question of "which persons have sustained injuries too remote from an antitrust violation to give them standing to sue for damages under § 4 of the Clayton Act." The Court observed that Congress had given no direct guidance on the question and that courts, faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, had been forced to resort to an analysis no less elusive than that employed traditionally by courts of common law with respect to the matter of "proximate cause." In applying that concept to a statutory antitrust action, this Court stated that "we look (1) to the physical and

economic nexus between the alleged violation and the harm to the plaintiff and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making the defendant's conduct unlawful and in providing a private remedy under § 4." 457 U.S. at 478.

To paraphrase the Court's application of its proximate cause analysis to *McCready:*

> We do not think that because the goal of the conspirators was to halt encroachment by . . . [the WHA] . . . into a market that . . . [the NHL and its member clubs] . . . sought to preserve for themselves, . . . [the Totems] . . . injury is rendered "remote". The availability of the Section 4 remedy to some person who claims his benefit is not a question of the specific intent of the conspirators. Here the remedy can not reasonably be restricted to those competitors whom the conspirators hope to eliminate from the market . . . . [Using the Seattle Totems, and the other member teams of the Western Hockey League, as the instrumentality to deny those Western cities to the WHA] . . . was the very means by which it is alleged that . . . [the NHL] . . . sought to achieve its illegal ends. The harm to . . . [the Totems] . . . was clearly foreseeable; indeed it was a necessary step in effectuating the alleged illegal conspiracy. Where the injury alleged is so integral an aspect to the conspiracy alleged, there can be no question but that the loss was precisely "the type of loss that the claimed violations . . . would be likely to cause." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489, 50 L.Ed.2d 701, 97 S.Ct. 690, quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125, 23 L.Ed.2d 129, 89 S.Ct. 1562 (1969).

457 U.S. at 478, 479, with bracketed material substituted for factual references in the original.

In this litigation, the District Court and the Court of Appeals were persuaded by *Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3rd Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 2657 (1984) that any denial of an NHL franchise to the plaintiffs was pro-competitive rather than anti-competitive, in its effect and hence not violative of the antitrust laws. As the Court of Appeals reasoned "The Totems were not competing with the NHL; they were seeking to join it. . . . Without an NHL franchise Seattle constituted a potential WHA site, and the denial, if any, of an NHL franchise under these circumstances did not injure competition."

That analysis flies in the face of the overwhelming evidence presented at trial. Here, the plaintiffs proved that, by inducing the Seattle Totems and the other cities of the Western Hockey League to stay in business and to sign the White Paper agreement, and by promising the Totems an NHL franchise, the defendants intentionally and effectively "froze" Seattle as an NHL city, excluded the rival WHA from Seattle, and effectively destroyed all of the Totems other options, including those of joining the WHA or, together with other teams of the Western Hockey League, forming their own rival major league. In so doing, and then reniging on the promise to the plaintiffs of an expansion franchise, the defendants perpetuated the NHL monopoly, and combined and conspired to restrain trade in professional hockey.

The plaintiffs produced direct evidence from the mouths of certain of the conspirators to support their contention that the NHL had engaged in conduct to exclude the rival, competitive WHA from cities that were suitable to house major league franchises, specifically Seattle and

the other members of the Western Hockey League. Two former members of the Board of Governors of the NHL testified that the defendants had formed a battle plan to combat the rival WHA: i.e., to expand quickly into cities which were potential locations for WHA teams; to sign as many players as possible (Tr. 2820, 2836, 2846); and to execute the White Paper as a means of keeping the WHA out of Seattle and the other cities of the Western Hockey League. (Tr. 2835, 2836, 2846). A former NHL Governor described the White Paper as the means by which the WHA would be destroyed. Once promised franchises in the NHL, he testified, the cities of the Western Hockey League would forego their chance to join the WHA and would opt instead for the NHL. (Tr. 2873).

In contrast, *Mid-South Grizzlies* stands merely for the proposition that a simple denial of a sports franchise to an applicant, without more, is not anti-competitive. None of the issues which dominate this litigation were present in the *Mid-South* case. There, the Court of Appeals noted that "No claim is made that abuse of NFL market power led to the demise of the World Football League, and no issue is before us concerning the activities of the NFL, since that demise, which may have inhibited the development of competition by another football league." 720 F.2d at 784-785. The Court in *Mid-South Grizzlies* made clear that the case "does not present any issue of possible antitrust violation from the exclusion of potential competitors in the designated exclusive home territories." 720 F.2d at 776.

Here, the observations of the trial court and the Court of Appeals to the effect that, without an NHL franchise Seattle constituted a potential WHA site, and that the

denial of an NHL franchise under those circumstances did not injure competition, completely ignores the facts as proved at trial. By the time in 1974 when the NHL announced the award of "conditional" franchises to Seattle and Denver, the WHA and the NHL had entered into a consent decree, ceased their war, and had started negotiations towards an eventual merger of the leagues. The Totems, who had been required to abrogate the White Paper and disband the Western Hockey League, were left with a single alternative—the NHL. The WHA was finished, and was not a viable alternative. Eventually, of course, four of the fourteen WHA teams were absorbed into the NHL, and the WHA died.

Here, the plaintiff's suit is clearly not derivative of any other action. The Totems have claimed damages for injuries suffered only by it and for no other injury. The Totems' injury is direct, in that it arises from its relationship with the NHL; i.e., the commitments contained in the White Paper, the grant of the "conditional" franchise, the disbanding of the Western Hockey League at the NHL's direction, and the subsequent conduct of the defendants which deprived the Totems of the promised franchise. The claimed injury is not consequential or secondary, as it does not result from injury to a third party. Finally, the harm suffered by the plaintiff is not remote, in that it is the immediate result of the NHL's illegal conduct, without an intervening cause.

There can be no dispute that the actions of the defendants were anti-competitive, i.e., they were directed toward the destruction of a competitor. This Court has held that the right of redress is not restricted to those competitors (the WHA) whom the conspirators sought

to eliminate from the market. The promise of a grant of an expansion franchise to the plaintiffs, pursuant to the White Paper agreement, was the very means by which the NHL sought to achieve its illegal ends, i.e., the eradication of the rival WHA. The resultant harm to the plaintiff was clearly foreseeable and was a necessary step in effectuating the ends of the illegal conspiracy. The Seattle Totems' injury was an integral aspect of the conspiracy alleged, and the loss of the expansion franchise was precisely the type of loss that the claimed violation would be likely to cause. The injury suffered by the Seattle Totems was "inextricably intertwined" with the injury that the NHL sought to inflict on the WHA. It was clearly foreseeable that the failure to grant the promised NHL franchise, after the Western Hockey League had been dismembered, the White Paper abrogated, and after entry of the consent decree ending the WHA litigation, would severely injure the business and the property of the plaintiffs within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15.

CONCLUSION

This Court should grant the Writ of Certiorari to address the substantial question of antitrust standing discussed *infra*. The Court of Appeals has failed to follow the clear teachings of this Court, and has disregarded the broad remedial and enforcement purposes underlying § 4 of the Clayton Act as expressed and emphasized by this Court's consistent decisions since the Sherman Act was enacted in 1890. This action presents the opportunity to

give very necessary guidance to the Courts and to private antitrust litigants.

DATED this 18th day of September, 1986.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NOS. 84-3581
84-3605

DC NO. 75-804

SEATTLE TOTEMS HOCKEY CLUB, INC., et al.,

Plaintiffs-Appellants,

v.

THE NATIONAL HOCKEY LEAGUE, NORTHWEST SPORTS ENTERPRISES, LTD., et al.,

Defendants-Appellees.

NORTHWEST SPORTS ENTERPRISES, LTD.,

Counterclaimant-Appellee,

v.

VINCENT H.D. ABBEY and ELDRED W. BARNES,

Counterdefendants-Appellants.

OPINION

Appeal from the United States District Court
for the Western District of Washington

Honorable Donald S. Voorhees, District Judge, Presiding

Argued and Submitted January 8, 1986—Seattle, WA

BEFORE: WRIGHT, CANBY AND WIGGINS,
CIRCUIT JUDGES.

CANBY, CIRCUIT JUDGE.

This case arises out of the financial demise of plaintiff Seattle Totems, a hockey team of which plaintiffs

Vincent H.D. Abbey and Eldred W. Barnes were principal officers, directors and shareholders. The Totems and Abbey and Barnes brought an antitrust action against the defendant National Hockey League (NHL) and some of its members. One member of that league is the Vancouver Canucks, owned by defendant Northwest Sports Enterprises, Inc. Northwest Sports counterclaimed, asserting certain breaches of contract by plaintiffs.

The district court dismissed plaintiffs' antitrust claims and directed a verdict granting part of defendants' counterclaim and denying the rest. We review both the dismissals and the directed verdict de novo, viewing the evidence in the light most favorable to the losing party. *Los Angeles Memorial Coliseum Com'n v. National Football League,* 726 F.2d 1381, 1387 (9th Cir.), *cert. denied,* 105 S. Ct. 397 (1984) (directed verdict). Because the antitrust and contract issues were tried separately, we review them separately here.

PART I. ANTITRUST

The Seattle Totems were a minor league hockey team that played in the Western Hockey League (WHL). They suffered financial difficulties, and in 1971, the WHL terminated their franchise. In 1972, Northwest Sports purchased 55.56% of the Totems' stock. Northwest Sports also agreed to assume the Totems' liabilities and to advance funds for their operations. Abbey and Barnes, who owned a 44.44% interest in the Totems, continued as shareholders and agreed to guarantee repayment of their pro rata share of Northwest Sports' advances to the Totems. The Totems regained their WHL franchise.

In 1971, the World Hockey Association (WHA), which is not a party to this action, was formed as a major professional hockey league. The WHA competed with the established major league, defendant NHL, for players, fans, and revenues.

With the emergence of a second major league, WHL owners concluded that WHL teams needed major league status to survive. In June 1972, the NHL and the WHL entered into an agreement called the "White Paper." The White Paper provided that, if the NHL expanded after the 1974-75 season, it would offer to WHL members at least one-half of any expansion franchises in four WHL cities. In June 1974, the NHL voted to award a conditional franchise to Abbey for Seattle to commence play in the 1976-77 season. The conditional franchise for Seattle expired because Abbey did not fulfill the conditions. The NHL did not award a conditional or final franchise for Seattle to anyone else. The Totems did not seek or receive a WHA franchise.

On appeal, the Totems[1] challenge the district court's dismissal of their antitrust claims that the alleged NHL monopoly wrongfully denied Totems an NHL franchise, denied them the opportunity to join the WHA, and destroyed the WHL. We affirm.

I. *The Seattle NHL Franchise*

The district court dismissed the Totems' claim for damages for their failure to receive an NHL franchise.

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[1] For purposes of the antitrust portion of this opinion, "the Totems" refers collectively to Abbey, Barnes, and the Seattle Totems Hockey Club, Inc.

The district court found that "any denial of an NHL franchise to plaintiffs . . . was procompetitive, rather than anti-competitive in its effect and hence not violative of the anti-trust laws."

The Totems argue that they were injured by an NHL monopoly that allegedly violated the antitrust laws. They contend that the NHL and its member teams have monopolized professional hockey in North America. The Totems cite a number of agreements and practices through which the NHL achieved the alleged monopoly. The Totems claim that the NHL monopoly was "exercised to exclude competition and to obtain total control over all major league professional hockey franchises, including the purchase prices paid therefor [sic)."

The offense of monopolization (15 U.S.C. § 2) consists of the willful acquisition or maintenance of monopoly power in the relevant market and the existence of actual injury to competition in that market. *See, General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 970-71 (9th Cir. 1983) and cases cited therein. "To establish anticompetitive market effect, the plaintiff must prove that the defendant's actions caused a decrease in competition in the relevant market."[2] *Avdin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983). A plaintiff has the burden to plead and prove that the defendant's

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2 "[D]esignation of the relevant market requires considerable judgment. Its dimensions include the product involved, the geographical limits within which it functions, and the appropriate time frame." *General Business Systems*, 699 F.2d at 973. For a discussion of the relevant market for a professional sports association such as the NHL, see *Los Angeles Memorial Coliseum Com'n*, 726 F.2d at 1392-94.

actions harmed competition, not that the actions harmed plaintiff in its capacity as a competitor. *Id.* at 902 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 701 (1977); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494 (1979)).

The Totems were not competing with the NHL; they were seeking to join it. They were granted a conditional NHL franchise but failed to fulfill the conditions precedent to obtaining a final franchise. The WHA was competing as a major professional hockey league at that time. Without an NHL franchise Seattle constituted a potential WHA site, and the denial, if any, of an NHL franchise under these circumstances did not injure competition. *See, Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, — U.S. —, 104 S. Ct. 2657 (1984). There is no contention or showing that the denial was to protect any other major league team in the Seattle market; there was none. *See id.* at 787; *Los Angeles Memorial Coliseum Com'n*, 726 F.2d 1381 (antitrust violation to restrict entry of one NFL team into another team's market).

The Totems argue that there is more here than the mere denial of a sports franchise. They argue that there was a grand scheme on the part of the NHL to destroy the WHA by promising franchises to WHL teams so that those teams would not join the WHA. "Once peace had been made between the NHL and WHA, however, the NHL moved to avoid its responsibilities" under its White Paper agreement with the WHL. One of those alleged "moves" was apparently to deny Seattle a franchise. This argument misses the point. The Totems' allegations of wrong-

ful conduct by the NHL do not establish that competition in the relevant market was injured by those acts. Consequently, the Totems have failed to meet their burden of proof on this issue.[3]

II. *Claim of Unlawful NHL Conduct toward the WHA*

The district court dismissed the Totems' claim that they were denied an opportunity to join the WHA "for lack of evidence in the record as to the value of a Seattle franchise in that league."[4] "An antitrust plaintiff who is excluded from the relevant market by anticompetitive activity is entitled to recover his lost profits." *Dolphin Tours, Inc. v. Pacifico Creative Service, Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985). Alternatively, a plaintiff who is excluded from the relevant market may seek to recover the value of his business. *Id.* at 1511 n.4. A defendant, whose illegal conduct excluded others from the relevant market, should not benefit because its actions make it more difficult for the plaintiff to establish the amount of its injury. *Id.* at 1512. There must, however, be sufficient evidence from which a jury could determine the amount of damages, and the plaintiff bears the burden of anticipat-

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3 Because we determine that the district court properly dismissed the Totems' claims regarding an NHL franchise, we do not reach the Totems' claim that the trial court erred in ruling that their damages arising from the denial of an NHL franchise were measured as of the time of the alleged denial.

4 The trial court found that the Totems had standing to allege an antitrust injury arising from allegedly anticompetitive conduct of the NHL directed toward the WHA. Because we affirm the district court's dismissal on evidentiary grounds, we do not address the NHL's contention that the Totems lacked standing.

ing a hypothetical free market in establishing the amount of his injury. The trier of fact is allowed to act on probative and inferential proof in determining those damages, although the award may be an approximation. *Id.* at 1511.

The Totems allege that the NHL's anticompetitive activities caused the Totems to be unable to secure a WHA franchise. The district court found that the measure of the Totems' damages on this claim was the value of a WHA franchise in Seattle at the time it was foreclosed from joining the WHA, not the value of an NHL franchise at that time. The Totems, therefore, had the burden of establishing the value of a Seattle WHA team in a hypothetical economic free market. *See id.* at 1512. The Totems presented no evidence to establish that value. Consequently, there was not sufficient evidence from which a jury could have determined damages, and the trial judge properly dismissed this claim.

III. *Destruction of WHL*

The district court dismissed the Totems' claim that they were denied the opportunity to form a new major hockey league with other WHL teams. The court found a lack of evidence in the record to sustain that claim. Specifically, the court ruled that "[t]o recover on this claim plaintiffs must prove the intention and preparedness of the WHL clubs to form such a league." The court held that there was no evidence in the record to sustain an affirmative finding upon either element, and that "[t]here is in fact much evidence to the contrary." In addition, the Totems presented no evidence of the value of a Seattle franchise in such a league.

The WHL teams opted not to join the WHA or to form an independent major hockey league. Instead, they entered into the White Paper agreement with the NHL for purposes of obtaining NHL franchises. The record, therefore, supports the district judge's ruling.

The district judge ruled, in a separate order, on the Totems' claim that the NHL's allegedly monopolistic activities caused the destruction of the WHL. The judge found that the assertion of this claim was untimely and that it would be prejudicial to defendants to allow it to be asserted. In addition, the district judge found that the claim was not supported by testimony.

We have reviewed the record and conclude that the district judge did not abuse his discretion by this separate ruling. In addition, the lack of evidence as to the value of a Seattle WHL franchise (whether minor or major league) independent of the NHL in a hypothetical economic free market deprived the jury of sufficient information from which to determine damages for such a claim.[5]

PART II. Northwest Sports' Counterclaim

In 1972, Northwest Sports acquired a 55.56% interest in the Totems. Abbey and Barnes owned a 44.44% interest in the Totems. Abbey, Barnes and Northwest Sports entered into an agreement, dated April 7, 1972 (the 1972 Agreement). This contract provided that Northwest Sports would advance funds to enable the Totems to operate, that Abbey and Barnes would guarantee to Northwest

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5 Prior to the bail-out by Northwest Sports, which was affiliated with the NHL, the Totems had lost their WHL franchise due to insolvency.

Sports repayment of 44.44% of all moneys advanced by Northwest Sports to the Totems, and that if a National Hockey League (NHL) franchise were granted to the Totems for Seattle, Abbey and Barnes would purchase Northwest Sports' 55.56% interest in the Totems. Abbey and Barnes subsequently agreed to pay to Northwest Sports interest on the repayable 44.44% share of the advances.

On June 12, 1974, the NHL announced the award of a "conditional" franchise to Abbey, as representative of Seattle, to commence play in the 1976-77 season. The award of the franchise was subject to several conditions, including the requirements that a long-term arena lease be obtained and that certain franchise payments be made.

Prior to the NHL's announcement of the award of a conditional franchise to Seattle, Abbey, Barnes and Northwest Sports negotiated the 1974 Agreement.[6] The 1974 Agreement set out the terms for the repurchase of Northwest Sports' shares in the Totems by Abbey and Barnes and provided that Abbey and Barnes would repay the advances made by Northwest Sports to the Totems. A condition precedent to the 1974 Agreement was that the NHL announce, before June 30, 1974, the award of a franchise to Seattle.

Northwest Sports counterclaimed against Abbey and Barnes for breach of the 1972 and the 1974 agreements. The district court rejected a defense theory raised by Abbey and Barnes that Northwest Sports had made it impossible for them to perform the agreements. The district

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[6] The 1974 Agreement was not signed by Abbey until July 1974.

court found that Abbey and Barnes had breached the 1972 Agreement. The court accordingly directed a partial verdict in favor of Northwest Sports. The district court ruled that Northwest Sports was not entitled to reimbursement for player development costs under the 1972 Agreement. With regard to the 1974 Agreement, the district court entered a directed verdict in favor of Abbey and Barnes finding that a condition precedent to that agreement had not been fulfilled. Abbey and Barnes appeal, and Northwest Sports cross-appeals. We affirm the rejection of the contractual interference defense appealed by Abbey and Barnes, and reverse and remand with regard to both issues raised by Northwest Sports on its cross-appeal.

I. *"Impossible Performance" Defense*

In granting a partial directed verdict for Northwest Sports on its claims under the 1972 Agreement, the district court rejected the contention of Abbey and Barnes that the jury should decide whether they were relieved of their repayment obligation because Northwest Sports had rendered their performance impossible by its failure to provide an accounting and by its refusal to provide to Abbey the original Seattle Totems' stock certificates.

One party to a contract who prevents another party from performing his promise cannot recover for the nonperformance of that promise. *Hydraulic Supply Mfg. Co. v. Mardesich,* 57 Wish.2d 104, 352 P.2d 1023, 1024 (1960) (vessel left harbor before refrigerator plant had been reassembled, thereby preventing company from completing testing of its work; shipowners could not recover from company for damages allegedly resulting from improper

repair). The purpose of this rule is to prevent a party from benefiting by its wrongful acts. *Wolk v. Bonthius,* 13 Wash.2d 217, 124 P.2d 553, 554 (1942).

Abbey and Barnes rely on *United States ex rel Acme Granite & Tile Co. v. F. D. Rich Co.,* 437 F.2d 549, 553 (9th Cir. 1970), *cert. denied,* 404 U.S. 823 (1971). That case involved an action by a subcontractor (Acme) for damages against the prime contractor (F. D. Rich Co.) on an army housing project. Acme had refused to proceed with plastering on the project after the Army inspector revoked his approval of some of the houses because of defective framing by another subcontractor. Corrective measures were taken by the framing contractor, but their quality was in dispute. An impasse developed, and Rich declared Acme in default and employed another contractor to finish the work. 437 F.2d at 551. The court concluded that the district court's entry of a judgment notwithstanding the verdict was improper because "there was a question of fact whether Rich, by its failure to have B & G correct the defective framing job, prevented Acme from going ahead with its obligations under the contract." 437 F.2d at 553.

The situation here is not parallel to that in *Acme Granite.* The 1972 Agreement does not provide that Northwest Sports is required to give an accounting to Abbey and Barnes before the repayment obligation of Abbey and

Barnes arises.[7] That obligation arose with each advance made by Northwest Sports to the Totems. Abbey and Barnes do not contend that Northwest Sports failed to make the contracted-for advances to the Totems. While Abbey and Barnes may have hoped to receive an NHL franchise, the fact that they did not, whether or not that failure was due to any wrongful act of Northwest Sports, does not excuse them of their obligation under the 1972 Agreement to repay Northwest Sports 44.44% of moneys advanced or paid on behalf of the Totems. That obligation was not conditioned upon obtaining an NHL franchise.

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[7] The 1972 Agreement provides:

> Abbey and Barnes covenant and agree with Northwest that they will pay or cause to be paid to Northwest 44.44% of all moneys advanced by Northwest to Totems or paid by Northwest on behalf of Totems (whether advanced or paid prior or subsequent to the date hereof) whenever the same or any portion thereof become due and payable and that Abbey and Barnes will at all times indemnify, protect and save harmless Northwest from all costs, losses, expenses and damages arising by reason of any default of Totems to repay any of such moneys, and that no release or releases by Northwest of the whole or any part of the obligations of Totems no matter in what manner any such release or releases may come about, and no indulgence shown by Northwest in respect of any defaults of Totems in repaying such moneys and no extension or extensions granted by Northwest to Totems for the repayment of any such moneys, nor any other dealings between Northwest and Totems shall in any way modify, alter or prejudice Northwest or the liability of Abbey and Barnes in any way hereunder. Northwest shall not be obliged to exhaust its recourses against Totems before requiring payment or performance by Abbey and Barnes. Any accounts settled or stated by or between Northwest and Totems or admitted by or on behalf of Totems may be adduced by Northwest and shall in that case be accepted by Abbey and Barnes as conclusive evidence that the balance or amount thereby appearing is due by Totems to Northwest.

Northwest Sports, therefore, did not interfere with the ability of Abbey and Barnes to perform, nor did Northwest Sports make performance physically impossible. *See Acme Granite*, 437 F.2d at 553; *Hydraulic Supply Mfg. Co.*, 352 P.2d at 1024. The district court did not err in rejecting the impossible performance defense and directing a verdict in favor of Northwest Sports on Abbey and Barnes' breach of their repayment obligation under the 1972 contract. We affirm.

II. *"All Moneys Advanced"*

The 1972 Agreement provides that Abbey and Barnes agreed to pay Northwest Sports 44.44% of "all moneys advanced by Northwest to Totems or paid by Northwest on behalf of Totems. . . ." The trial judge ruled, as a matter of law, that Northwest Sports was entitled to recover from Abbey and Barnes 44.44% of the advances made by Northwest to the Totems, "other than those advances which were made for player development." The judge reasoned that advances for player development were made primarily for the benefit of Northwest Sports' Vancouver hockey club not for the Totems. The judge based his conclusion in part on the fact that for Canadian tax purposes, the Vancouver club and Northwest Sports treated player development costs as expenses incurred by the Vancouver club and Northwest Sports, not as costs of the Totems for which Northwest Sports was making advances.

Northwest Sports argues that the contractual term "all moneys advanced" is not ambiguous and that the trial court erred in admitting extrinsic evidence of Northwest Sports' tax treatment of the advances. Abbey and

Barnes point to the compound nature of the provision which could be rewritten as "all moneys advanced by Northwest to Totems" and "all moneys paid by Northwest on behalf of Totems." Abbey and Barnes contend that the term "advanced" referred to sums expended by Northwest Sports to enable the Totems to pay several of its outstanding debts and liabilities that existed prior to or at the time Northwest Sports acquired its shares of the Totems stock, whether Northwest made the advances before or after the date of the 1972 Agreement. On the other hand, "all moneys paid on behalf of Totems" must, Abbey and Barnes argue, be read to exclude sums paid for player development costs because those sums were "paid to the Totems for the purpose of training players for the NHL, and thus Vancouver's benefit."

" 'The intent of the parties to the contract is to be gleaned from the document itself, and only if it is ambiguous is parol evidence regarding the parties' actual intent admissible.' " *Kwik-Lok Corp. v. Pulse,* 41 Wash. App. 142, 702 P.2d 1226, 1229 (1985) (quoting *McGary v. Westlake Investors,* 99 Wash. 2d 280, 285-86, 661 P.2d 971 (1983)) (citation omitted). The term "ambiguous" means " 'capable of being understood in either of two or more possible senses.' " *Kwik-Lok Corp.,* 702 P.2d at 1229 (quoting *McGary v. Westlake Investors,* 99 Wash. 2d 280, 285-86, 661 P.2d 971 (1983)). "Words in a contract are to be given their ordinary meaning unless the context dictates otherwise." *General Tel. Co. of the Northwest v. C-3 Assoc.,* 32 Wash. App. 550, 648 P.2d 491, 493 (1982). Whether a written contract is ambiguous is a question of law reviewed de novo. *See, General Tel. Co.,* 648 P.2d at 493.

The issue here is whether player development costs paid by Northwest Sports fall within the scope of the reimbursement provision. In order to determine whether those payments were made "on behalf of" the Totems, the court properly admitted extrinsic evidence to determine the purpose of those payments, but not to expand, vary or contradict the terms of the contract. *See, Morgan v. Stokely-Van Camp, Inc.*, 34 Wash. App. 801, 663 P.2d 1384, 1388 (1983). Northwest Sports contends that the trial court incorrectly evaluated that evidence in determining that amounts paid by Northwest Sports for player development costs did not constitute recoverable advances. We agree.

The trial court characterized all sums paid by Northwest Sports after the commencement of the 1972-73 season as player development costs. Prior to that point, Northwest Sports had advanced $595,000.[8] During and after the 1972-73 season Northwest Sports advanced over a million dollars to the Seattle Totems. The Totems then billed Northwest Sports for that amount as "cost of developing players" for the Vancouver Hockey Club, Ltd. These costs included salary, FICA, workman's compensation and bonuses.

Northwest Sports acknowledges that it intended to use the Totems as Vancouver's development club to train young hockey players before they entered major league competition, replacing its development club in Rochester, New York. Northwest Sports' tax treatment of the ad-

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[8] The district judge awarded Northwest Sports $264,418, which is 44.44% of $595,000, less payments received plus interest on the unpaid balance.

vances as player development costs is also probative on the issue of whether these payments were on behalf of the Totems. Nevertheless, the "paid on behalf of Totems" provision would be rendered meaningless if we construe it to exclude all advances by Northwest Sports to the Totems for operating expenses incurred by the Totems after Northwest Sports' acquisition of its majority interest.

The payments by Northwest Sports benefited the Totems directly, because they enable the club to operate. Vancouver benefited also, because it was able to use the Seattle club to develop future major league players. We, therefore, conclude that the parties intended that Northwest Sports be reimbursed by Abbey and Barnes for all sums paid to the Totems to enable the club to continue in existence whether or not those sums also constituted payments for player development expenses of Northwest Sports. We reverse the partial directed verdict entered in favor of Abbey and Barnes and remand to the district court for entry of judgment in accordance with this opinion on Northwest Sports' breach of contract claim arising out of the 1972 Agreement.

III. *Condition Precedent—1974 Agreement*

Northwest Sports contends that the district court erred in ruling, as a matter of law, that the condition precedent in the 1974 Agreement had not been met and by directing judgment for Abbey and Barnes on Northwest Sports' breach of contract claim arising out of the 1974 Agreement. The 1974 Agreement provided:

> This Agreement (with the exception of this paragraph) shall only be effective if, prior to June 30, 1974, the National Hockey League announces that it

> shall grant a National Hockey League Franchise to Totems or to N.H.L.-Seattle and shall be effective as of the date of such announcement.

On June 12, 1974, the NHL announced that it would grant a franchise to the Abbey group, subject to the fulfillment of several conditions. The district court found that the announcement of the grant of a conditional franchise to the Abbey group on behalf of Seattle did not satisfy the condition precedent because "the 1974 agreement was conditioned upon the announcement of the granting of an *actual* NHL franchise, which never occurred." (Emphasis added.)

The ambiguity in the 1974 contract[9] arises from the parties' failure to specify whether they meant the announcement of a conditional franchise *or* the announcement of an actual or final franchise *or* the announcement of any kind of franchise, conditional or final. The record shows that Northwest Sports owned one NHL team and that the 1972 Agreement provided for the buyback of Totems' stock for Northwest Sports if the Totems were awarded an NHL franchise. The 1974 Agreement, which provided the terms of the buyback, conditioned its effec-

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[9] Paragraph 18 of the 1974 Agreement provides that "[t]his Agreement shall be interpreted in accordance with the laws of the Province of British Columbia." The parties have not raised the issue of the applicable law and no British Columbia law has been cited. Rule 44.1, Federal Rules of Civil Procedure, requires a party who intends to raise the law of a foreign country to give notice in his pleadings or other reasonable written notice. Where the parties do not give notice of intent to raise issues of foreign law, this court is under no obligation to apply foreign law to construe a contract. *See Commercial Ins. Co. of Newark, N.J. v. Pacific-Peru Const. Corp.*, 558 F.2d 948, 952 (9th Cir. 1977).

tiveness on the announcement of "a" franchise before a specified date.

It is significant that the 1974 Agreement required only an announcement, not the actual award of a franchise. In addition, it was apparently not unusual for the NHL to condition franchise awards upon the receipt of franchise payments and assurance of a facility. The parties may not have even contemplated that, once the long-awaited Seattle NHL franchise was granted, Abbey and Barnes would be unable to obtain the necessary financial backing and that a conditional franchise would not mature to an actual franchise.

We conclude that the parties intended the 1974 Agreement to be effective upon the announcement that Seattle would get a franchise, even if that announcement was conditioned on the securing of a facility and the making of franchise payments. Had Abbey and Barnes complied with those conditions, and the 1974 agreement, they would have been full owners of the Totems at the time a franchise was entered into. The district court erred by interpreting the condition precedent in the 1974 Agreement to require the announcement by the NHL of the grant of an "actual" franchise to Seattle. We reverse the district court's dismissal of Northwest Sports' counterclaim for breach of the 1974 Agreement and remand.

AFFIRMED AS TO APPEAL; REVERSED AND REMANDED AS TO CROSS APPEAL.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C75-804V

SEATTLE TOTEMS HOCKEY CLUB, INC., et al.,

Plaintiffs,

v.

THE NATIONAL HOCKEY LEAGUE, et al.,

Defendants.

ORDER

Having considered defendants' motion to dismiss or for a directed verdict, the Court now finds and rules as follows:

In this action plaintiffs have asserted three claims arising out of defendants' actions in alleged violation of the antitrust laws. These claims are:

1. That the Seattle Totems was denied a national Hockey League franchise.

2. That the Seattle Totems was denied the opportunity to join the newly-formed World Hockey Association.

3. That the Seattle Totems was denied the opportunity to join with other Western Hockey League clubs to form a rival major hockey league.

I feel compelled to grant defendants' motion with respect to the NHL franchise. I am persuaded by *Mid-South Grizzlies v. The National Football League* (3d Cir. 82-1793 Slip Opinion, September 1983), *San Francisco*

Seals, Ltd. v. National Hockey League, 379 F. Supp. 966 (C.D. Cal. 1974) and *Levin v. National Basketball Association,* 385 F. Supp. 149 (S.D.N.Y. 1974), that any denial of an NHL franchise to plaintiffs, assuming that there was a denial, was pro-competitive, rather than anti-competitive, in its effect and hence was not violative of the antitrust laws.

The Court of Appeals for the Third Circuit held in *Mid-South Grizzlies* that the denial by the NFL of a franchise to the Mid-South Grizzlies in Memphis was "patently pro-competitive since it left the Memphis area, with a large stadium and a significant metropolitan area population, available as a site for another league's franchise and it left the Grizzlies' organization as a potential competitor in such a league."

The same can be said concerning the denial of an NHL franchise to the Seattle Totems. That denial, if there was one, left Seattle with a fine ice hockey arena and a large metropolitan population wide-open as the potential site for a WHA franchise and the WHA, in consequence, as a strengthened, rather than weakened competitor of the NHL.

Plaintiffs assert that *Mid-South Grizzlies* is distinguishable from the present case in that defendants acted with bad motives in denying a franchise to plaintiffs. *Mid-South Grizzlies,* however, addressed the issue of motivation. In that case the plaintiffs contended that they could at trial prove that "the motivation for their rejection was to punish them for having attempted in the past to compete with the NFL in the World Football League, or to reserve the Memphis location for friends of present league team owners."

In response to this the Third Circuit stated:

> "... those disputed facts are not material under Section 1 of the Sherman Act, if the action complained of produces no injury to competition."

The Third Circuit went on to hold that their analysis of the Section 1 Sherman Act claim applied equally to the Grizzlies' Section 2 claim.

The court in *Levin* also considered at length the motivation of the defendant NBA in rejecting the application of the plaintiffs for a franchise. It concluded that motives were immaterial so long as the act of rejection was not anticompetitive.

I have given serious consideration to *Fishman v. Wirtz,* 1981-2 Trade Cases (CCH) Section 64,378 (N.D. Ill. 1981) upon which plaintiffs place heavy reliance, but I find that case to be clearly distinguishable on its facts from the present case.

Plaintiffs' second claim is that the actions of defendants denied to the Seattle Totems the opportunity to seek and secure a WHA franchise.

After Vincent Abbey decided not to seek a 1976/1977 NHL franchise the Seattle Totems was, it would seem, perfectly free to seek a WHA franchise, but, viewing, as I must, all the evidence and the inferences therefrom most favorably to the plaintiffs, I find it to be a jury question as to whether the acts of defendants foreclosed plaintiffs' opportunity to secure a WHA franchise.

With respect to standing to assert the WHA-related claim, I find that, even though the alleged anti-competitive activities of the NHL were directed toward the WHA, the Seattle Totems had standing to sue because the exclusion

of the WHA from the Seattle market meant that the Seattle Totems would necessarily be foreclosed from securing a WHA franchise in Seattle. In this respect *Blue Shield of Virginia vs. McCready,* 457 U.S. 465 (1982) is controlling.

A word, however, about the measure of damages: In *Brunswick Corporation v. Pueblo Bowl-O-Mat,* 429 U.S. 477 (1977), the Supreme Court held that one claiming damages under the antitrust laws must prove not only an antitrust violation but an antitrust injury, that is the injury suffered by the claimant must have been caused by the antitrust violation. In the present case, if there was in fact an antitrust violation, it was a violation directed toward the WHA. The WHA, not the Seattle Totems, was the target. The injury allegedly suffered by the WHA was its exclusion from the Seattle market. The antitrust injury claimed by the Seattle Totems by reason of the anticompetitive activity of defendants toward the WHA was the inability of the Totems to secure a WHA franchise. Under *Brunswick* the Seattle Totems may be awarded damages only for its antitrust injury, that is, the injury it sustained by being foreclosed from joining the WHA. The measure of damages for that claim is, however, the value of a WHA franchise in Seattle at the time of the foreclosure, not the value of an NHL franchise in Seattle at that time. There is no evidence at all in the record as to the value of a WHA franchise in Seattle at the time of the foreclosure or, for that matter, at any time.

I find that plaintiffs' claim that they were denied the opportunity to join the WHA must be dismissed for lack of evidence in the record as to the value of a Seattle franchise in that league.

Plaintiffs' third claim is that the actions of defendants denied the Seattle Totems the opportunity to combine with other WHL clubs to form a major hockey league. To recover on this claim plaintiffs must prove the intention and preparedness of the WHL clubs to form such a league. There is no evidence in the record to sustain an affirmative finding upon either of these elements. There is in fact much evidence to the contrary. In addition, the measure of damages would be the value of a Seattle franchise in a newly-formed major league of the WHL clubs, yet there is no evidence at all in the record of the value of such a franchise.

I find that plaintiffs' claim that they were denied the opportunity to form a new major hockey league with other WHL cities must be dismissed for lack of evidence in the record to sustain that claim.

The claims of plaintiffs based upon the alleged denial of an NHL franchise, upon an alleged lost opportunity of the WHL clubs to form a new major hockey league, and upon an alleged lost opportunity to join the WHA are DISMISSED WITH PREJUDICE as to all defendants.

These rulings upon defendants' motions to dismiss require that the complaint of the plaintiffs as against all defendants be DISMISSED WITH PREJUDICE.

DATED this 19th day of December, 1983.

/s/ Donald S. Voorhees
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C75-804V

SEATTLE TOTEMS HOCKEY CLUB, INC., et al.,

Plaintiffs,

v.

THE NATIONAL HOCKEY LEAGUE, NORTHWEST SPORTS ENTERPRISES, LTD.; VANCOUVER HOCKEY CLUB, LTD.; FRANK A. GRIFFITHS; WILLIAM J. HUGHES, et al.,

Defendants.

NORTHWEST SPORTS ENTERPRISES, LTD.,

Counterclaim Plaintiff,

v.

VINCENT H.D. ABBEY and ELDRED W. BARNES,

Counterclaim Defendants.

ORDER GRANTING JUDGMENT TO COUNTERCLAIM PLAINTIFF

This cause is before the Court on motions by the counterclaim plaintiff, Northwest Sports Enterprises, Ltd., for a directed verdict under the 1972 Agreement, and by counterclaim defendants, Vincent H. D. Abbey and Eldred W. Barnes, for a directed verdict under the 1974 Agreement. Based upon the evidence adduced at trial, the Court GRANTS the motions.

Northwest Sports Enterprises, Ltd., is entitled to judgment against the defendants Vincent H.D. Abbey and Eldred W. Barnes for 44.44% of the advances made by

Northwest to the Seattle Totems, other than those advances which were made for player development, or the sum of $264,418, less $146,429, being the sum paid by Abbey and Barnes to Northwest on September 9, 1974. Interest on the principal balance of $117,989 is the sum of $173,832 as of October 15, 1983, for a total judgment of $291,821. Interest on the unpaid amount of the judgment shall run from October 15, 1983, at the statutory rate pursuant to 28 U.S.C.A. Section 1961(a) (1983 Supp.) and shall be computed daily to the date of payment and compounded annually. 28 U.S.C.A. Section 1961(b) (1983 Supp.).

On defendants' motion, the Court rules as a matter of law that the 1974 agreement did not become an enforceable contract because of the failure of the condition precedent to formation of that contract. Although the evidence showed that the National Hockey League announced the granting of a conditional franchise to the City of Seattle represented by Mr. Vincent Abbey, the Court finds that the 1974 agreement was conditioned upon the announcement of the granting of an actual NHL franchise, which never occurred.

Further, and for the same reason, subparagraph F. 8 of the 1972 Agreement, which required a sale of Northwest's 55.56% interest in the Seattle Totems Hockey Club, Inc., to Abbey and Barnes, was not triggered by the "announcement" of a conditional franchise. Accordingly, Northwest Sports Enterprises, Ltd., is still the legal owner of its stock in the Seattle Totems Hockey Club, Inc., although defendants claim that they have the absolute right to re-acquire all of the stock of the Seattle Totems Hockey Club, Inc., pursuant to the terms of the 1972 Agreement.

It is, therefore, ORDERED, ADJUDGED AND DECREED, that the Clerk of this Court enter judgment for counterclaim plaintiff Northwest Sports Enterprises, Ltd., and against counterclaim defendants, Vincent H.D. Abbey and Eldred W. Barnes, in the amount of $291,821.00, with interest to run thereon pursuant to 28 U.S.C.A. Section 1961(a) (1983 Supp.), from October 15, 1983, until fully paid.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 10th day of January, 1984.

/s/ Donald S. Voorhees
United States District Judge

APPENDIX D

SHERMAN ACT: 15 U.S.C. § 1, 2:

Section 1: Trusts, etc., in restraint of trade illegal; penalty:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2: Monopolizing trade a felony; penalty:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

CLAYTON ACT: 15 U.S.C. § 15(a)

Suits by person injured:

(a) *Amount of recovery; prejudgment interest*

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.